Kelab Sukan Pulau Pinang & Anor v Vijayapal Singh a/l Hira Singh & Anor

Kelab Sukan Pulau Pinang & Anor v Mohammad Noor bin Abu Bakar

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-339 OF 1995 AND P-04-106 OF 1995
GOPAL SRI RAM, NH CHAN AND MAHADEV SHANKAR JJCA
15 MAY 1997

Labour Law *— Employment — Redundancy — Whether termination on the ground of redundancy was justified — Whether the fact that other businesses of the employer were doing well was a relevant consideration in reinstating a redundant employee*

Vijayapal Singh ('Singh') was employed as a 'restaurant captain' while Mohammad Noor bin Abu Bakar ('Noor') was employed as the food and beverage executive in the respondent ('the club'). Both the restaurant and bar of the club was continually running at a loss and was therefore privatized to a private caterer. Under such circumstances, the services of Singh and Noor were terminated. Singh and Noor were both dissatisfied with the termination. They applied for relief to the Minister in accordance with the provisions of the Industrial Relations Act 1967. The Minister referred the dispute to the Industrial Court. Both Singh and Noor named the parties to the dispute as the club and themselves. The chairman of the Industrial Court ('the chairman') found as a fact that the restaurant was running at a loss, forcing the club to reorganize its services, and found as a fact that the termination of Noor for redundancy was justified. However, the chairman decided that the club should employ Singh as an additional captain because it was prudent to have an extra captain as the business in three other bars in the club was good; thus, he ordered the club to reinstate Singh within one month with wages, increments and bonus backdated to the date of his termination.

The learned judge allowed Noor's application for leave to file for certiorari and held that the award of the chairman was a nullity because the club was not a legal entity. As regards the award with respect to Singh, the learned judge dismissed the club's application for leave to file certiorari but allowed a stay of execution of the award pending appeal. The issues before the Court of Appeal were whether: (i) the award was a nullity because the club was not a legal entity; and (ii) the chairman's decision-making process in so far as Singh was concerned was fatally flawed.

Held, allowing both appeals of the club:

(1) Having named the parties to the dispute as the club and themselves in their complaint to the Minister and in the Industrial Court, it was not open to Singh or Noor to allege that the club was not a legal entity. Further, there was never any doubt in anybody's

mind about the identity of the employer against whom they were seeking relief (see pp 424E and 426D). A

(2) Once the chairman found as a fact that the closing down of the restaurant by the club was done bona fide because of the losses incurred and that the termination of Noor's services was for an established redundancy, the award in so far as it concerned Noor could not be impugned. B

However, the chairman's decision-making process in so far as Singh was concerned was fatally flawed because having correctly stated the criteria as regards Noor, he failed to apply the same criteria as regards Singh. The only conclusion open to the chairman was that Singh's employment had also been terminated for redundancy because the position in which he was employed in the restaurant no longer existed. In this case, to say that the other three bars were doing good business at that time was an irrelevant consideration which the chairman should not have allowed to influence his mind in reinstating Singh the way he did (see pp 426D–F and 427F). C D

[Bahasa Malaysia summary

Vijayapal Singh ('Singh') telah digaji sebagai seorang 'kapten restoran' manakala Mohammad Noor bin Abu Bakar ('Noor') digaji sebagai eksekutif makanan dan minuman di premis penentang ('kelab tersebut'). Kedua-dua restoran dan bar kelab tersebut seringkali menanggung kerugian dan dengan itu telah diswastakan kepada penyaji persendirian. Di bawah keadaan sedemikian, perkhidmatan Singh dan Noor telah diberhentikan. Kedua-dua Singh dan Noor tidak berpuas hati dengan pemberhentian itu. Mereka memohon relief daripada Menteri menurut peruntukan Akta Perhubungan Perindustrian 1967. Menteri merujuk pertikaian itu kepada Mahkamah Perusahaan. Keuda-dua Singh dan Noor menamakan kelab tersebut dan diri mereka sebagai pihak-pihak kepada pertikaian itu. Pengerusi Mahkamah Perusahaan ('pengerusi') mendapati bahawa restoran memang menanggung kerugian, yang memaksa kelab tersebut menyusun semula perkhidmatannya, dan mendapati bahawa pemberhentian Noor atas lebihan adalah berjustifikasi. Namun demikian, pengerusi memutuskan bahawa kelab tersebut patut menggaji Singh sebagai kapten tambahan kerana ianya adalah bijak untuk menggaji seorang kapten tambahan memandangkan perniagaan dalam tiga bar lain di kelab tersebut adalah baik; justeru itu, beliau memerintahkan kelab tersebut supaya mengembalikan jawatan Singh dalam tempoh sebulan dengan gaji, kenaikan dan bonus diundurkan tarikh pelaksanaan pemberhentian. E F G H

Hakim yang arif membenarkan permohonan Noor untuk kebenaran memfailkan certiorari dan memutuskan bahawa award pengerusi adalah satu pembatalan kerana kelab tersebut bukanlah satu entiti undang-undang. Mengenai award berkenaan dengan Singh, hakim yang arif menolak permohonan kelab tersebut untuk kebenaran I

memfailkan certiorari tetapi membenarkan penggantungan pelaksanaan award sementara menunggu rayuan. Isu-isu di hadapan Mahkamah Rayuan adalah sama ada: (i) award tersebut merupakan satu pembatalan kerana kelab tersebut bukanlah suatu entiti undang-undang; dan (ii) proses membuat keputusan pengerusi berkenaan dengan Singh adalah cacat.

Diputuskan, membenarkan kedua-dua rayuan kelab tersebut:

(1) Setelah menamakan kelab tersebut dan diri mereka sebagai pihak-pihak kepada pertikaian dalam aduan kepada Menteri dan di Mahkamah Perusahaan, ianya tidak terbuka kepada Singh atau Noor untuk mengatakan bahawa kelab tersebut bukanlah satu entiti undang-undang. Seterusnya, tiada sebarang keraguan dalam minda sesiapa tentang identiti majikan terhadap mana mereka menuntut relief (lihat ms 424E dan 426D).

(2) Sebaik sahaja pengerusi mendapati bahawa penutupan restoran oleh kelab tersebut dibuat bona fide akibat kerugian yang ditanggung dan bahawa pemberhentian perkhidmatan Noor adalah untuk lebihan yang ditunjukkan, award itu setakat mana ia berkenaan dengan Noor tidak boleh dipersoalkan.

Walau bagaimanapun, proses membuat keputusan oleh pengerusi sejauh mana ia berkenaan Singh adalah cacat kerana setelah menyatakan kriteria berkenaan Noor dengan betulnya, beliau gagal memakai kriteria yang sama berkenaan dengan Singh. Satu-satunya kesimpulan yang terbuka kepada pengerusi adalah bahawa penggajian Singh juga telah diberhentikan atas lebihan kerana kedudukan dalam mana dia digaji dalam restoran tidak lagi wujud. Dalam kes ini, untuk mengatakan bahawa tiga bar yang lain menjalankan perniagaan yang baik pada masa itu adalah pertimbangan yang tidak relevan yang tidak sepatutnya mempengaruhi pengerusi dalam mengembalikan jawatan Singh sebagaimana yang dilakukannya (lihat ms 426D–F dan 427F).]

Notes

For cases on employment, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 595–914.

Legislation referred to

Employment Act 1955
Industrial Relations Act 1967

Appeal from: Originating Motion No 25–20 of 1995 and 25–8 of 1995 (High Court, Pulau Pinang)

P Navaratnam (*Vello & Associates*) for the appellants.
Darshan Singh (*Darshan Singh & Co*) for the respondents.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): Vijayapal Singh ('Singh') was employed with effect from 1 March 1987 as 'restaurant captain' by the Kelab Sukan Pulau Pinang ('the club'). Mohammad Noor bin Abu Bakar ('Noor') was employed by the club with effect from 15 January 1984 as the food and beverage executive. Noor was responsible for the supervisions and proper running of the club's restaurant and bar.

Because the restaurant and bar was continually running at a loss, the General Committee of the club decided to privatize it and hand-over the running thereof to a private caterer with effect from 1 October 1989, under the style of Fu Shen Restaurant. The club decided that in the circumstances, it would have to terminate the services of Singh and Noor. It issued letters of termination to both of them on 15 September 1989. The termination letters were accompanied with cheques for termination benefits calculated in accordance with the provision of the Employment Act 1955. The club requested the caterer to absorb Noor and Singh into his establishment but he refused.

Singh and Noor were both dissatisfied with the termination. They applied for relief to the Minister in accordance with the provisions of the Industrial Relations Act 1967. On 28 September 1990, the Minister referred the dispute to the Industrial Court.

This reference was initiated by Noor and Singh. They named the parties to the dispute as Kelab Sukan Pulau Pinang and themselves. They filed a joint statement of case (Case No 2/4–253/90) which they intituled:

Between

Kelab Sukan Pulau Pinang

and

1 Mohammad Noor bin Abu Bakar

2 Vijayapal Singh a/l Hira Singh

This pleading was so filed with the benefit of legal advice from an eminent firm of solicitors. The case was eventually heard on 16 and 17 September 1994.

The chairman of the Industrial Court made his award on 23 December 1994 ('the award'). In the award, the chairman found as a fact that the restaurant was running at a loss, forcing the club to reorganize its services, and found as a fact that the termination of Noor for redundancy was justified. There were three other bars in the club. Each had its own captain. Each of them was senior to Singh. At the time of the hearing in 1994, evidence was given that the business in these bars was good. So the chairman decided that the club should employ Singh as an additional captain because it was prudent to have an extra captain when any of the other three have their rest days or were on vacation, and he ordered the club to reinstate Singh within one month with wages, increments and bonus backdated to 15 September 1989.

This award was only served by the court on the club's solicitors on 30 December 1994 by the Industrial Court, Pulau Pinang.

On 6 February 1995, Noor's solicitors applied for leave to file for certiorari and obtained the same on 27 February 1995. Pursuant thereto, they filed the substantive Motion No 25–8–1995 on 1 March 1995. The matter came on for hearing on 29 June 1995. Mr Darshan Singh for Noor strenuously argued that the award was a nullity because Kelab Sukan Pulau Pinang was not a legal entity. The learned judge adjourned the matter for consideration. On 25 July 1995, he held that the award was a nullity for the reason aforesaid and quashed it. The notes of evidence reads:

> Keputusan
>
> Semua prosiding di Mahkamah Perusahaan 'nullity' sebab pihak responden tidak wujud.
>
> Permohonan certiorari perintah (1), (2) dan (6) dibenar dengan kos.

The club and its secretary have appealed to us against this decision.

The club's solicitors did not move with equal alacrity as regards the award with respect to Singh. Application for leave to file certiorari must be made within six weeks of the award. Even if we compute the period from 30 December 1994, they should have moved the court by 11 February 1995. The club committee apparently only instructed their solicitor to apply by letter dated 13 February 1995. The lawyer says he received this letter on 17 February 1995, got the papers ready and served it on Singh's solicitors on 2 March 1995 and filed it on 7 March 1995.

The reasons advanced for this delay did not impress the judge in the court below. He heard the application for extension of time on 20 April 1995 together with the application for leave and for a stay of execution of the award. On 24 April 1995, the learned trial judge dismissed the application for extension of time. He mistakenly stated that there was a delay of 75 days but this is not critical. Apparently, Singh was already back in the club but the back wages had been deposited with his solicitors. The judge allowed their application for stay of execution in relation to RM50,000 deposited pending the appeal to the Court of Appeal which was subsequently registered as P–02–339–1995.

As earlier indicated, the point about the award being a nullity was ventilated in Noor's application which was heard on 29 June 1995. The same point was raised in the course of the hearing of the club's application against Singh on 24 April 1995 but it was not dealt with because the club could not get an extension of time.

When the two appeals came on together on 10 October 1996, the counsel for both parties agreed we had the jurisdiction to dispose all the outstanding applications.

We first dealt with the club's appeal against the refusal of the trial judge to extend time to apply for leave. Mr Navaratnam emphasized the alleged extenuating circumstances and the merits of this appeal. Mr Darshan Singh relied very heavily on the delay and appeared to suggest that the existence of merits was irrelevant. Our difficulty was that the order made by the judge in Noor's application quashed the award altogether. In other words, being a single award which jointly affected both Singh and Noor its

effect was to deprive Singh of any benefits the award conferred on him. We had to give leave because the whole award was quashed. The whole issue as to whether the decision-making process could be impugned thus became wide open.

The cross-appeal by Mr Darshan Singh against the stay order became academic because we proceeded to hear both the appeals immediately thereafter.

The first issue was whether the award was a nullity because the club was not a legal entity. With respect to Mr Darshan Singh, this was a mere technicality. As pointed out by Gopal Sri Ram JCA in the course of hearing, s 29(5) of the Industrial Relations Act ('the Act') 1967 reads:

> The Court shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities and legal forms.

Having themselves initiated the complaint to the Minister and in the Industrial Court in this format, we hold that it was not open to Singh or Noor to take such a point. There was never any doubt in anybody's mind about the identity of the employer against whom they were seeking relief.

Once the chairman found as a fact that the closing down of the restaurant by the club was done bona fide because of the losses being incurred and that the termination of Noor's services was for an established redundancy, the award in so far as it concerned Noor could not be impugned.

However, the chairman's decision-making process in so far as Singh was concerned was fatally flawed because having correctly stated the criteria as regards Noor, he failed to apply the same criteria as regards Singh. The only conclusion open to the chairman was that Singh's employment had also been terminated for redundancy because the position in which he was employed in the restaurant no longer existed.

Section 5(2)(a) of the Act reads:

> (2) Subsection (1) shall not be deemed to preclude an employer from —
> (a) refusing to employ a person for proper cause, or not promoting a workman for proper cause, or suspending, transferring, laying-off or discharging a workman for proper cause; ... .

And s 13(3)(d) reads:

> (3) Notwithstanding subsection (1), no trade union of workmen may include in its proposals for a collective agreement a proposal in relation to any of the following matters, that is to say —
> (d) the termination by an employer of the services of a workman by reason of redundancy or by reason of the reorganisation of an employer's profession, business, trade or work or the criteria for such termination; ... .

These are managerial prerogatives. The chairman recognized them when he quoted AC Malhotra at p 16 of this award, and followed up with his own findings. The passage reads:

> AC Malhotra in his book *Dismissal, Discharge, Termination of Service and Punishment* (7th Ed) had stated:

A But the rule of 'Last come, First Go' would have obviously no application to the case of retrenchment of the only employee in a particular category of workmen. In such a case, it is retrenchment of the post itself and therefore, if for reasons of economy and any genuine interest of reorganization, the services of a single employee of a category have to be dismissed, there is no scope for the application of this principle.

B The club has the right to re-organize its business and in so doing it must ensure that such reorganization is bone fide and not capricious. In our case, after privatization, the first claimant's position was no more in existence. The club had satisfied this court that the redundancy was in fact the real reason for the first claimant's dismissal.

C The same criteria applied equally to Singh. It does not seem to have occurred to the chairman that what he was doing by compelling the club to reinstate Singh was to create a post for him as a stand-by captain who would only have work as and when any of the other three captains fell ill, or were taking rest or went on vacation. In other words, Singh would have been idle at other times. To compound the error even further, the chairman D backdated Singh's emoluments till 15 September 1989, when Singh had done no work at all in the interim. What applies to Noor applies equally to Singh. On the facts before him, the only finding possible was that both jobs had become redundant.

The Industrial Court was concerned with the club's position in E September 1989. There was overwhelming and irrefutable evidence that the restaurant/bar was making losses and had been for quite some time before that. Indeed, the club's accounts which are in evidence shows losses for the previous years as well. To say that the other three bars were doing good business in September 1994 is an irrelevant consideration which the chairman should not have allowed to influence his mind in reinstating F Singh the way he did.

In so far as Singh is concerned, we therefore allowed the club's appeal against the order of the court below and quashed the award of the chairman in so far as it directed the reinstatement of Singh and further directed any payments to be made to him. We substituted a finding that G Singh's dismissal for redundancy was justified and the money deposited by the club with Singh's solicitors be returned. In the exercise of our discretion, we made no order for costs in this appeal here or in the court below but the security deposit will be refunded to the appellant.

In so far as the club's appeal in the case of Noor is concerned, we H directed that the order of certiorari made in the court below and its consequential reinstatement be set aside. We further ordered that his dismissal for redundancy do stand. We also ordered here that there be no order for costs here or in the court below but that the deposit be refunded to the appellant.

I *Order accordingly.*

Reported by Loo Lai Mee